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BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	FINAL ORDER
NO. 27197-s40A BY WARREN SILLIVAN	)	

\* \* \* \* \*

The time period for filing exceptions to the May 2, 1985, Proposal for Decision in this matter has expired. One timely response was received, from Larry and Joy Nell Schanz. For the reasons stated below, and after having given the objection full consideration, the Department accepts and adopts the Findings of Fact and Conclusions of Law as contained in the May 2, 1985, Proposal for Decision, and incorporates them herein by reference.

RESPONSE TO EXCEPTION

In response to the Proposal for Decision in this matter, Larry and Joy Nell Schanz have alleged that the proposed issuance of a permit to the Applicant will leave downstream users with a "disproportionate share of saline water."

Mr. and Mrs. Schanz did not appear at the scheduled hearing in this matter to give information concerning the alleged saline problem, nor did they submit such information on the record, even in the form of stating it as a concern in their original written objection in this matter. No evidence on the issue of a salinity

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problem was introduced on the record in any form by a party in this matter. Therefore, it is not possible to address the Schanz's concerns, since the record offers no basis upon which to do so: the issue was raised only after the record was closed, and even then was raised as an unsupported allegation.

Therefore, based upon the Findings of Fact and Conclusions of Law, and all files and records in this matter, the Department makes the following:

#### FINAL ORDER

Subject to the terms, restrictions, and conditions specified below, Application for Beneficial Water Use Permit No. 27197-s40A is hereby granted to Warren Sillivan to appropriate 450 gpm up to 124.8 acre-feet of water per year for sprinkler irrigation of 52.3 acres, during the period of April 1 to October 15, inclusive, of each year. The point of diversion shall be in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 33, and the place of use in the SE $\frac{1}{4}$  of Section 33, all in Township 5 North, Range 19 East, Golden Valley County, Montana. The source of supply is Big Coulee Creek, and the water is to be diverted by means of a pump. The priority date for this Permit shall be 5:00 p.m., March 26, 1980.

This Permit is issued subject to the following express terms, restrictions, and conditions:

A. The water rights evidenced by this Permit are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize diversions by the Permittee to the detriment of any senior appropriator.

B. The Permittee shall cease exercising the permitted appropriation once the flow rate in the Musselshell River at the USGS gaging station near Roundup, Montana, drops below the following amounts for the months indicated:

April	20.3 cubic feet per second (cfs)
May	87.2 cfs
June	139.4 cfs
July	218.2 cfs
August	188.3 cfs
September	90.5 cfs
October	21.7 cfs

C. The flow rates may be adjusted when the adjudication process is completed or if additional information on existing water rights becomes available.

D. The Permittee shall measure or meter all water withdrawals under this Permit and submit the amounts, dates, and times of those withdrawals to the Lewistown Water Rights Bureau (Box 480, Lewistown, MT 59457) on a weekly basis.

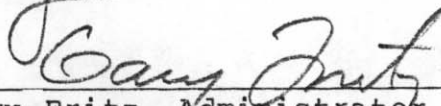
E. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this Permit. Nor does the Department, in issuing this Permit, acknowledge any

liability for damages caused by the exercise of this Permit,  
even if such damage is a necessary and unavoidable  
consequence of the same.

NOTICE

The Department's Final Order may be appealed in accordance  
with the Montana Administrative Procedures Act by filing a  
petition in the appropriate court within thirty (30) days after  
service of the Final Order.

DONE this 8<sup>th</sup> day of July, 1985.

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
32 South Ewing, Helena, MT 59620  
(406) 444 - 6605

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AFFIDAVIT OF SERVICE

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark    )

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on July 7, 1985, she deposited in the United States mail, First Class, a Final Order by the Department on the Application by Warren Sillivan, Application No. 27197-s40A, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Warren Sillivan, Box 98, Ryegate, MT 59074
2. James B. Zinne, Ryegate, MT 59074
3. Zinne Bros., c/o Alvin Zinne, Ryegate, MT 59074
4. DNRC, c/o Engineering Bureau, 32 S. Ewing, Helena, MT 59620
5. Johnny Schanz, Rural Route 1, Ryegate, MT 59074
6. Larry & Joy Nell Schanz, Ryegate, MT 59074
7. Gerry M. Higgins, Box 14, Ryegate, MT 59074
8. Sam Rodriguez, Water Rights Bureau Field Manager, Lewistown, MT (inter-departmental mail)
9. Gary Fritz, Administrator, Water Resources Division

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Donna Elser

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark    )

On this 7th day of July, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Uddy Roda  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 3-1-88

CASE # 27197





BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\*\*\*\*\*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	PROPOSAL FOR DECISION
NO. 27197-S40A BY WARREN SILLIVAN	)	

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Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was scheduled for March 17, 1982 in Roundup, Montana. At the time set for the hearing, but prior to commencement thereof, the parties who had made appearances for the purpose of the hearing agreed to a settlement, based on the specific permit conditions set out below.

It recently has come to the Department's attention that the Proposal for Decision in this matter was never issued. Therefore, in the interests of a full and complete record in this matter, the Department hereby issues the Proposal for the review of all parties.

STATEMENT OF THE CASE

On March 26, 1980, Warren Sullivan filed an Application for Beneficial Water Use Permit to appropriate 450 gallons per minute ("gpm") up to 124.8 acre-feet of water per year from Big Coulee Creek, for new sprinkler irrigation of 52.3 acres of land located

in the SE $\frac{1}{4}$  of Section 33, Township 5 North, Range 19 East, Golden Valley County, Montana. The water is to be diverted from Big Coulee Creek by a pump at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 33, Township 5 North, Range 19 East, Golden Valley County, Montana between April 1 and October 15, inclusive, of each year.

The pertinent portions of the Application were published in the Times-Clarion, a newspaper of general circulation in the area of the source, on June 12, 19, and 26, 1980.

Timely objections were filed to the Application by Larry and Joy Nell Schanz, Johnny Schanz, James B. Zinne, Zinne Brothers c/o Alvin W. Zinne, and by the Engineering Bureau of the Department of Natural Resources and Conservation.

Larry and Joy Nell Schanz and Johnny Schanz alleged generally that Big Coulee Creek already is overappropriated, that insufficient water is available for stockwater, domestic, and garden uses, and that the proposed appropriation would increase the problem.

Zinne Brothers, represented by Alvin Zinne, objected generally on the basis that the proposed appropriation would adversely affect their own appropriation right.

James B. Zinne stated that he felt Big Coulee Creek should be divided equally among landowners and water users along its route. He objected to the Application on the basis that it would limit his own water use application.

The Engineering Bureau of the Department of Natural Resources and Conservation objected to the Application on the basis that it would take water from Deadman's Basin and the Delphia-Melstone



Project, since Big Coulee is a tributary of the Musselshell River, which supplies water to the projects.

On May 29, 1980, a memorandum was sent to T. J. Reynolds and Sam Rodriguez by Department Soil Scientist Glenn R. Smith, discussing the soils and water quality in the area of the proposed appropriation.

On February 17, 1982 the Lewistown Water Rights Bureau Field Office mailed to the parties a copy of the Musselshell River Water Availability Analysis by Sterling Sundheim, Engineer for the Lewistown Water Rights Bureau Field Office. The report was accompanied by a proposal to issue a permit in this matter, with certain specified conditions, and a notice of a conference to be held on February 24, 1982 in the Roundup Courthouse for the purpose of explaining the report and discussing the proposed conditions.

A March 15, 1982 Memorandum was prepared by Sterling Sundheim for inclusion in the contested case file in this matter, setting forth the particulars of the Application, of the Objectors' claimed water uses, and of the results of the March 9, 1982 field investigation. The Memorandum stated that Department personnel had met with the Applicant and the Objectors on February 24, 1982, but that the Objectors had not agreed to the proposed permit conditions: the DNRC Engineering Bureau suggested an additional permit condition requiring a metering device, and the other Objectors expressed concern over allowing the Applicant to irrigate during the months of July through September.

At the time scheduled for the hearing on this matter, on March 17, 1982, the DNRC Engineering Bureau submitted a list of proposed permit conditions. The list of permit conditions is signed "Approved--3/17/82--Warren Sullivan", and is also signed and dated 3/17/82 by Steven O. Fry of the Engineering Bureau.

The Department of Natural Resources and Conservation (the "Department"), having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

#### FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and the parties hereto, whether they appeared at the hearing or not.
2. The Application for Beneficial Water Use Permit in this matter was duly filed with the Department of Natural Resources and Conservation on March 26, 1980 at 5:00 p.m.
3. The Applicant intends to use the water for irrigation, which is a beneficial use. MCA 5-2-102(2).
4. The source of supply for the proposed appropriation is Big Coulee Creek, a tributary of the Musselshell River.
5. The Applicant's proposed means of diversion is a pump and sprinkler system.
6. On the basis of the Musselshell River Water Availability Analysis, there are unappropriated waters in the source of supply, at times when the water can be put to the use proposed by the Applicant.

7. The Musselshell River Water Availability Analysis indicates that the amount of water the Applicant seeks to appropriate is not always available, throughout the period during which the Applicant seeks to appropriate. There are virtually no years when water is available in July or August.

8. The Applicant and Objector DNRC Engineering Bureau agreed to issuance of a permit in this matter, subject to the following conditions:

1. Subject to all prior existing water rights in the source of supply.
2. Subject to any final determination of existing rights as provided by Montana law.
3. The permittee shall cease exercising the permitted appropriation once the flow rate in the Musselshell River at the USGS gaging station near Roundup, MT drops below the following amounts for the months indicated:

April	20.3 cubic feet per second (cfs)
May	87.2 cfs
June	139.4 cfs
July	218.2 cfs
August	188.3 cfs
September	90.5 cfs
October	21.7 cfs

4. The flow rates may be adjusted when the adjudication process is completed or if additional information on existing water rights becomes available.

5. The permittee shall measure or meter all water withdrawals under this permit and submit the amounts, dates, and times of those withdrawals to the Water Rights Bureau on a weekly basis.

Based on the Foregoing proposed Findings of Fact, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and all the parties hereto, whether present at the hearing or not.
2. Those parties who failed to appear at the hearing are in default pursuant to Administrative Rule of Montana § 1.3.214(1).
3. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.
4. The Department must issue a permit if the Applicant proves by substantial credible evidence that the following criteria are met:
  - (1) there are unappropriated waters in the source of supply:
    - (a) at times when the water can be put to the use proposed by the applicant;
    - (b) in the amount the applicant seeks to appropriate; and
    - (c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
  - (2) the rights of a prior appropriator will not be adversely affected;
  - (3) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
  - (4) the proposed use of water is a beneficial use;
  - (5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.
5. The Applicant intends to use the water for irrigation, which is a beneficial use. MCA § 85-2-102(2).
6. The proposed means of diversion, construction, and operation of the appropriation works are adequate.



7. There are unappropriated waters in the source of supply, at times when the water can be put to the use proposed by the Applicant.

8. Water availability studies indicate that the full amount of the requested appropriation is not available, at least during July and August.<sup>1</sup> However, the Applicant can make beneficial use of whatever amount of water is available under the permit conditions to which he has agreed. (Finding of Fact 8). See Montana Power Company v. Carey, 41 State Rep. 1233 (1984).

9. Subject to the Applicant's junior priority, and to the conditions imposed on the permit, diversions by the Applicant will not adversely affect prior appropriators.

10. Subject to the Applicant's junior priority and to the permit conditions agreed upon by the parties attending the hearing in this matter, the proposed use will not interfere unreasonably

<sup>1</sup> An administrative determination was made in 1984 that water is not available for appropriation in Big Coulee Creek during July or August. (See, e.g., In the Matter of the Application for Beneficial Water Use Permit No. 50642-s40A by Zinne Bros., Proposal for Decision, September 18, 1984.) Therefore, more recent permits on Big Coulee Creek have not included these months in the period of use which was granted therein.

However, the application and the settlement in this matter predate those permits. The period of use for this appropriation therefore does not specifically exclude the months of July and August, although the combined effects of the permit conditions and the prior appropriation rights on Big Coulee Creek as a practical matter may serve to foreclose appropriation by the Applicant during these months.



with other planned uses or developments for which a permit has been issued or for which water has been reserved. (See Finding of Fact 8.)

Therefore, based on the foregoing proposed Findings of Fact and Conclusions of Law, the Department makes the following:

PROPOSED ORDER

Subject to the terms, restrictions, and conditions specified below, Application for Beneficial Water Use Permit No. 27197-s40A is hereby granted to Warren Sillivan to appropriate 450 gpm up to 124.8 acre-feet of water per year for sprinkler irrigation of 52.3 acres, during the period of April 1 to October 15, inclusive, of each year. The point of diversion shall be in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 33, and the place of use in the SE $\frac{1}{4}$  of Section 33, all in Township 5 North, Range 19 East, Golden Valley County, Montana. The source of supply is Big Coulee Creek, and the water is to be diverted by means of a pump. The priority date for this permit shall be 5:00 p.m., March 26, 1980.

This permit is issued subject to the following express terms, restrictions, and conditions:

A. The water rights evidenced by this permit are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize diversions by the Permittee to the detriment of any senior appropriator.

B. The Permittee shall cease exercising the permitted appropriation once the flow rate in the Musselshell River at the USGS gaging station near Roundup, MT drops below the following amounts for the months indicated:

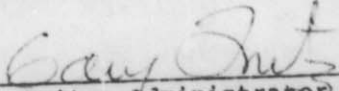
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C. The flow rates may be adjusted when the adjudication process is completed or if additional information on existing water rights becomes available.

D. The Permittee shall measure or meter all water withdrawals under this permit and submit the amounts, dates, and times of those withdrawals to the Lewistown Water Rights Bureau (Box 480, Lewistown, MT 59457) on a weekly basis.

E. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this permit. Nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by the exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

DONE this 2 day of May, 1985.

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
32 South Ewing, Helena, MT 59620  
(406) 444 - 6605

#### NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed permit, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (32 S. Ewing, Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1).

AFFIDAVIT OF SERVICE

STATE OF MONTANA       )  
                              ) ss.  
County of Lewis & Clark )

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on May 3, 1985, she deposited in the United States mail, first class mail, an order by the Department on the Application by Warren Sullivan, Application No. 27197-340A, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Warren Sullivan, Box 98, Ryegate, MT 59074
2. James B. Zinne, Ryegate, MT 59074
3. Zinne Bros., c/o Alvin Zinne, Ryegate, MT 59074
4. DNRG, c/o Engineering Bureau, 32 S. Wing, Helena, MT 59620
5. Johnny Schanz, Rural Route 1, Ryegate, MT 59074
6. Larry & Joy Nell Schanz, Ryegate, MT 59074
7. Gerry M. Higgins, Box 14, Ryegate, MT 59074
8. Sam Rodriguez, Water Rights Bureau Field Manager, Lewistown, MT (inter-departmental mail)
9. Gary Fritz, Administrator, Water Resources Division

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Donna Elser

STATE OF MONTANA       )  
                              ) ss.  
County of Lewis & Clark )

On this 3rd day of May, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John P. Gibson  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 11-21-1987

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